IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs September 11, 2001

STATE OF TENNESSEE v. JOE DAVID SLOAN

Direct Appeal from the Circuit Court for Madison County
No. 99-933 Donald H. Allen, Judge

No. W2000-02861-CCA-R3-CD - Filed January 4, 2002

The defendant was convicted of Class E felony evading arrest and operating a vehicle without valid registration. In this appeal, he challenges his conviction for evading arrest and raises the following issues: (1) whether the evidence is sufficient to support his conviction; (2) whether the trial court erred by not charging the jury on the lesser-included offense of "failure to yield to law enforcement officials," Tenn. Code Ann. § 55-8-104; and (3) whether his sentence is excessive when the trial court erred by imposing a sentence of four years based, in part, on prior convictions which were not proved at the sentencing hearing by certified copies of the judgments. After a review of the record, we find plain error in the conviction for felony evading arrest, and reduce that conviction to misdemeanor evading arrest. Accordingly, we sentence Defendant to serve eleven (11) months and twenty-nine (29) days, with a seventy-five (75%) percent minimum service prior to release, concurrent with the conviction for violation of vehicle registration law and consecutive to his prior convictions in Gibson County as classified in the judgment of the trial court. We remand this matter to the trial court for entry of a judgment in accordance with the opinion of this court. We affirm the conviction for violation of the vehicle registration law.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part, and Modified.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which NORMA MCGEE OGLE, and ROBERT W. WEDEMEYER, JJ., joined.

Clifford K. McGowan, Jr., Waverly, Tennessee (on appeal) and George Morton Googe, District Public Defender; and Vanessa D. King, Assistant Public Defender (at trial) for the appellant, Joe David Sloan.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; James G. Woodall, District Attorney General; Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On November 29, 1999, the Madison County Grand Jury indicted the defendant, Joe David Sloan, for aggravated burglary, theft of property over five hundred dollars, evading arrest, and operating a vehicle without valid registration. Following a jury trial, Defendant was convicted of evading arrest, Tenn. Code Ann. § 39-16-603, a Class E felony, and violating vehicle registration law, Tenn. Code Ann. § 55-5-114, a Class C misdemeanor. He was acquitted of the charges of aggravated burglary and theft. After a sentencing hearing, the trial court sentenced Defendant as a multiple Range II offender to four years for Class E felony evading arrest and thirty days for the misdemeanor offense. The trial court further ordered that these sentences be served concurrent with each other, but consecutive to sentences previously imposed on Defendant for prior convictions in Gibson County.

FACTUAL BACKGROUND

Shortly before 2:00 a.m. on August 28, 1999, George Fitzgerald, was awakened by noises which seemed to be coming from the kitchen area of his house. Remaining in bed, Fitzgerald dialed 911 and was talking with the dispatcher when Defendant appeared in the doorway to his bedroom. Fitzgerald yelled something, and Defendant quickly departed the house, got into his vehicle, and drove away.

Only minutes after Defendant's departure from Fitzgerald's house, Jackson, Tennessee police officers received information regarding a possible "burglary in progress" at Fitzgerald's address and were instructed to be on the lookout for an older model blue Mercury reported leaving the scene. Sergeant J.D. Hale was the first to spot the Mercury at 2:03 a.m. Hale and the driver of the Mercury passed each other on Wiley Parker Road, a few blocks from Fitzgerald's residence. Hale immediately made a "U-turn" and was joined by Officer Kevin Brown in a second police car, who had already turned his blue lights on. Brown tried to stop the Mercury by blocking the road in front of it with his vehicle, but Defendant drove off of the roadway, around Brown's police car, and continued down the road. Both Hale and Brown then pursued Defendant. Both officers were in uniform and drove marked police cars with the blue lights and sirens on.

The officers followed the Mercury to the stop sign at the intersection of Wiley Parker Road and Highland. The driver did not stop and turned southbound onto Highland. At this point, Sergeant Hale observed the driver jettison a "package" through the passenger side window. Hale saw the package land on the side of the road. The officers did not stop to retrieve the package, but continued to pursue Defendant, who continued south on Highland until he reached the entrance to the parking lot of a "Toys R Us" store. He turned into the parking lot, with the two police cars still following him, and began slowly driving in circles until Sergeant Hale pulled up alongside him. At this point, Defendant stopped his vehicle and placed both of his hands on the steering wheel. Defendant was alone in the vehicle. The officers arrested him and checked the registration tag on the Mercury. The vehicle registration listed Defendant as the owner, but the number on the tag belonged to a different vehicle.

The package thrown out of the Mercury was a soft leather "briefcase-type" bag, with several compartments on the side. The bag contained several miscellaneous items, which were discovered scattered on the side of the highway when police arrived a short time later. Among the items retrieved were personal papers, a checkbook, diary, cell phone, drug paraphernalia, and some currency. The police brought the items to Fitzgerald for identification, who then declared ownership and stated that the total worth of the property was approximately two thousand dollars. Further investigation of Fitzgerald's residence revealed pry marks and a broken lock on the back door. No other property damage was discovered.

George Fitzgerald and Defendant both testified at trial, giving markedly different versions of their relationship and the events of August 28, 1999. Fitzgerald testified that he did not know Defendant personally and had never seen him prior to his appearance in the doorway to his bedroom in the early morning hours of August 28, 1999. By contrast, Defendant testified that he and Fitzgerald used to "party together" and smoke crack cocaine. Defendant testified that, prior to his arrest, he had driven Fitzgerald to Virginia Street to pick up some "dope." He then dropped Fitzgerald off at his house and planned to return later that night. Prior to his return, he telephoned Fitzgerald who told him, "Just come on in. The back door is open." Returning to Fitzgerald's house at approximately 2:00 a.m., he came through the back door as instructed and called out, but no one answered. When he reached the bedroom, he heard Fitzgerald yell, "Oh my God, somebody's in my house." Fearing Fitzgerald might have a gun, Defendant ran out of the house, got into his vehicle, and drove away. Defendant noticed Fitzgerald had left his briefcase-type leather bag in Defendant's car.

Defendant testified that he encountered the first police officer shortly after leaving Fitzgerald's house. He admitted noticing that the officer's blue lights were flashing and that the second officer cut across the road in front of him. Defendant recalled driving around the officer, but claimed that he did not have to go off of the roadway to accomplish this. Defendant testified that he knew the officers were after him at this point, and he then recalled that Fitzgerald had left his leather bag in Defendant's car. Since it usually contained a vial of methamphetamines and he did not want to get caught with illegal drugs in his car, he threw the bag out the window during a turn, hoping the police officers would not see him do so.

Defendant testified that he had assumed Fitzgerald called the police and that officers were likely to arrive any minute. However, he did not want to wait for them because he had a criminal record. Defendant claimed that, once he realized that the police were pursuing him, he stopped his car as soon as an opportunity presented itself. He did not stop along the highway because he believed that, if he parked his car there, it would probably be towed. Further, Defendant testified that his haste to find a proper place to park caused him to run the stop sign. When asked why he did not pull into any of the other parking lots available on his route to the "Toys R Us" store, he replied that he did not notice them.

ANALYSIS

I. Plain Error - Sufficiency of Indictment to Allege Felony Evading Arrest

Before addressing the issues raised by Defendant in this appeal, we are compelled to address the following issue which was not raised by either party at trial or on appeal. The indictment in this case charges the Defendant with commission of the offense of *misdemeanor* evading arrest, rather than felony evading arrest, even though the cover of the indictment lists the charge as being a felony offense. Of course it is crucial that, in order for an indictment to perform its constitutional and statutory purposes, the facts constituting the offense be stated in ordinary and concise language in the body of the indictment. See Tenn. Code Ann. § 40-13-202 (1997); State v. Hill, 954 S.W.2d 725, 726-27 (Tenn. 1997).

The offense of "evading arrest" is defined in Tennessee Code Annotated section 39-16-603. Under certain circumstances, it can be a Class A misdemeanor, in other circumstances it is a Class E felony, and in certain other circumstances, it is a Class D felony. The statute provides in pertinent part as follows:

> **39-16-603. Evading arrest. –** (a)(1) Except as provided in subsection (b), it is unlawful for any person to intentionally flee by any means of locomotion from anyone the person knows to be a law enforcement officer if the person:
>
> (A) Knows the officer is attempting to arrest the person; or
>
> (B) Has been arrested.
>
> (2) It is a defense to prosecution under this subsection that the attempted arrest was unlawful.
>
> (3) A violation of subsection (a) is a Class A misdemeanor.
>
> (b)(1) It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop.
>
> (2) It is a defense to prosecution under this subsection that the attempted arrest was unlawful.
>
> (3) A violation of subsection (b) is a Class E felony unless the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony.

Tenn. Code Ann. § 39-16-603 (1997).

In this case, Count 3 of the indictment, charging Defendant with evading arrest, alleged as follows:

> THE GRAND JURORS of Madison County, Tennessee, duly empaneled and sworn, upon their oath, present that JOE DAVID SLOAN on or about August 28, 1999, in Madison County, Tennessee, and prior to the finding of this indictment, did intentionally evade arrest by fleeing in a vehicle from officers of the Jackson Police

> Department whom the said JOE DAVID SLOAN knew to be law enforcement personnel attempting to arrest him, in violation of T.C.A. § 39-16-603, all of which is against the peace and dignity of the State of Tennessee.

Tennessee Code Annotated section 39-16-603(a)(1) defines misdemeanor evading arrest. Tennessee Code Annotated section 39-16-603(b)(1) defines Class E felony evading arrest. We conclude that the term "by any means of locomotion," as contained in the definition of misdemeanor evading arrest, includes a "vehicle." As such, Count 3 of the indictment in this case, charging evading arrest, clearly alleged the misdemeanor, rather than felony, classification of evading arrest.

We are not unmindful that recent decisions of our supreme court have relaxed the strict pleading requirements of common law regarding issues concerning the sufficiency of allegations in indictments. See State v. Hammonds, 30 S.W.3d 294, 298-300 (Tenn. 2000); State v. Barney, 986 S.W.2d 545, 546 (Tenn. 1999); Ruff v. State, 978 S.W.2d 95, 100 (Tenn. 1998). However, in this case, the wording of the statute, while clearly sufficient to allege misdemeanor evading arrest, does not sufficiently allege elements of Class E felony evading arrest so that its constitutional and statutory purposes are satisfied. Specifically, the indictment does not allege that the Defendant operated the motor vehicle on a street, road, alley or highway in this State, nor does it allege that he refused to stop the vehicle after receiving a signal to do so from a law enforcement officer. The General Assembly chose to separately define felony evading arrest and misdemeanor evading arrest. While the proof at trial would clearly support a conviction of either Class E felony evading arrest or misdemeanor evading arrest, it is equally clear that a defendant cannot be convicted of an offense not charged in the indictment. State v. Trusty, 919 S.W.2d 305, 314 (Tenn. 1996) overruled on other grounds, State v. Burns, 6 S.W.3d 453 (Tenn. 1999).

In Ruff v. State, 978 S.W.2d 95, 100 (Tenn. 1998), our supreme court held that "where the constitutional and statutory requirements outlined in Hill are met, an indictment which cites the *pertinent statute* and *uses its language* will be sufficient to support a conviction." (Emphasis added); see also State v. Carter, 988 S.W.2d 145, 149 (Tenn. 1999). The requirements outlined in State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997), state that "an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy."

In this particular case, the inclusion of the statute section, "T.C.A. § 39-16-603," in the indictment does not suffice to meet the requirement that a defendant be given notice that he is charged with Class E felony evading arrest. No statutory subsections are named in the indictment. When considering the particular offense of "evading arrest," "T.C.A. § 39-16-603" may refer to a Class A misdemeanor offense, a Class E felony offense, or a Class D felony offense, and all contain different elements. In State v. Carter, 988 S.W.2d 145, 149 (Tenn. 1999), the supreme court deemed the indictment sufficient upon reference to the "appropriate statute," and in Ruff v. State, the court held that "an indictment which cites the *pertinent statute* and *uses its language* will be sufficient to support a conviction." Ruff, 978 S.W.2d at 100 (emphasis added). When a statute includes three different classifications of an offense, citation of the "appropriate" or "pertinent" statute logically

requires that the appropriate subsection be named in order for the indictment to be sufficient to support a conviction. Because the indictment in issue omitted the subsection number which would enable the accused to know that he was charged with a Class E felony, and the specific language (used by the State in drafting the indictment) alleges the offense constituting misdemeanor evading arrest, we hold that the indictment in this case only alleged the offense of misdemeanor evading arrest. The indictment did not allege the specific pertinent statute for Class E felony evading arrest. The indictment did not use the language in the statute which defines Class E felony evading arrest. The straightforward requirements of Hill were not followed in order to properly allege Class E felony evading arrest. As a result thereof, the Defendant's conviction for Class E felony evading arrest cannot be sustained.

Normally, issues not raised by the parties or included in a defendant's motion for new trial are considered waived. Tenn. R. App. P. 3(e). Nevertheless, an appellate court may review an issue which would ordinarily be considered waived if the court finds plain error in the record. See Tenn. R. Crim. P. 52(b). Rule 52 of the Tennessee Rules of Criminal Procedure states, "An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." See also State v. Adkisson, 899 S.W.2d 626, 636-42 (Tenn. Crim. App. 1994).

In an exercise of our discretion, we find Defendant's conviction of felony evading arrest constitutes plain error. Accordingly, we reverse that conviction and reduce the conviction to misdemeanor evading arrest, a Class A misdemeanor. Separately, we address Defendant's issue regarding sentencing based on a prior criminal record without offering proof in the form of certified copies of the judgments of conviction. We conclude that Defendant is not entitled for relief on that issue. If Defendant's conviction for felony evading arrest could have been affirmed, the maximum sentence imposed by the trial court would also be affirmed. Accordingly, upon de novo review, we set the sentence for misdemeanor evading arrest at eleven (11) months and twenty-nine (29) days, with a seventy-five (75%) percent minimum service prior to release, concurrent with the conviction in count 4 for violation of the vehicle registration law, and consecutive to the Gibson County convictions set forth in the judgment entered by the trial court.

In the event of further review, we will address the issues raised by the Defendant in this appeal.

II. Sufficiency of the Evidence

Defendant does not challenge his conviction for violating the vehicle registration law. However, he contends that the evidence was insufficient to sustain his conviction for Class E felony evading arrest. We disagree and also conclude that the evidence is sufficient to support a conviction for misdemeanor evading arrest as modified herein.

When evidentiary sufficiency is questioned on appeal, the standard of review is whether, after considering all the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). In determining the sufficiency of the evidence, we will not reweigh the evidence or substitute our own inferences for those drawn by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Instead, on appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. Hall, 8 S.W.3d at 599. A guilty verdict by a jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory, effectively removing the presumption of innocence and replacing it with a presumption of guilt. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of witnesses, the weight and value of evidence, and factual issues raised by the evidence are matters to be resolved by the trier of fact, not this Court. Id. The defendant bears the burden of demonstrating that the evidence is insufficient to support his or her conviction. State v. Pike, 978 S.W.2d 904, 914 (Tenn.1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Class E felony evading arrest, Tennessee Code Annotated section 39-16-603(b)(1), states that "[i]t is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop."

We conclude that when the evidence is viewed in the light most favorable to the State, as it must be, it is sufficient for a rational trier of fact to find the elements of Class E felony evading arrest beyond a reasonable doubt. First, it is undisputed that Defendant was operating the motor vehicle chased by Officers Hale and Brown and that he was driving on a street, road or highway in this state. Defendant's intent to flee was demonstrated by his continuing failure to stop, despite the officers' pursuit of him, accompanied by lights and sirens. It is also evident that Defendant attempted to elude law enforcement officers when he drove around Officer Brown's police car and, again, when he failed to stop at a stop sign during the officers' pursuit of him. Lastly, Defendant's admission at trial, "I know the officers was [sic] after me," clearly indicates that he received some sort of signal from the officers to bring his vehicle to a stop. Still, he failed to comply. Accordingly, the evidence would have been sufficient to sustain his conviction for Class E felony evading arrest. We also conclude that the evidence was sufficient to sustain the conviction for misdemeanor evading arrest. Defendant is not entitled to relief on this issue.

III. Failure to Instruct on Lesser-Included Offense

We will address this issue only as it was specifically raised by Defendant on appeal. We do not reach a conclusion as to whether or not the offense of "failure to yield to law enforcement officials" as set forth in Tennessee Code Annotated section 55-8-104 is a lesser-included offense of misdemeanor evading arrest. Defendant contends that the trial court erred by failing to instruct the jury on the offense of "failure to yield to law enforcement officials," pursuant to Tennessee Code

Annotated section 55-8-104. Defendant argues that this offense is a lesser-included offense of Class E felony evading arrest and, under the rationale utilized by the Tennessee Supreme Court in State v. Rush, 50 S.W.3d 424 (Tenn. 2001), his case should be reversed and remanded for failure to submit the appropriate instructions on this offense to the jury. We disagree.

The offense submitted by Defendant fails to satisfy the definition of a lesser-included offense of Class E felony evading arrest. In State v. Burns, 6 S.W.3d 453 (Tenn. 1999), the Tennessee Supreme Court adopted the following test for determining whether an offense is a lesser-included of the offense charged:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of
>
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Id. at 467.

Class E felony evading arrest is committed when any person, while operating a motor vehicle on any street, road, alley or highway in this state, intentionally flees or attempts to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop. See Tenn. Code Ann. § 39-16-603(b)(1) (1997). In addition to instructions on this offense, Defendant submits that the jury should have been instructed on the offense defined in Tennessee Code Annotated section 55-8-104, "Obedience to police officers," which provides that "no person shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic."

Under part (a) of the Burns test, disobedience to police officers, Tennessee Code Annotated section 55-8-104, is a lesser-included offense of Class E felony evading arrest if all of the statutory elements of that offense are included within the statutory elements of the greater offense. Part (a) is not satisfied, because section 55-8-104 contains statutory elements not found in the offense of Class E felony evading arrest. Specifically, section 55-8-104 requires that the accused willfully "fail or refuse to comply with *any* lawful order or direction" from "any police officer with authority to

direct, control or regulate traffic." Tenn. Code Ann. § 55-8-104 (1997) (emphasis added). "Any lawful order or direction" embraces directions to stop, turn right or left, back up, proceed, slow down, or go around. Class E felony evading arrest, on the other hand, specifically requires proof that the accused received a signal from a law enforcement officer to *bring his or her vehicle to a stop*. Further, we note that a conviction for disobeying a police officer also requires proof that the officer giving the accused an order or directions be "invested by law with authority to direct, control, or regulate traffic." Class E felony evading arrest, by contrast, merely requires proof that the accused received a signal to stop from *any* law enforcement officer, whether or not the officer has been invested by law with authority to govern traffic. This court has previously equated the mental element of "willful" (as found in Tennessee Code Annotated section 55-8-104) with the mental element of "intentional." See State v. Electroplating, Inc., 990 S.W.2d 211, 221 n.9 (Tenn. Crim. App. 1998).

As stated in State v. Rush, 50 S.W.3d 424 (Tenn. 2001), "[u]nder part (b) [of the Burns test], an offense may still be a lesser-included offense despite having a different element if the differing element reflects a less serious harm or risk of harm or involves a differing mental state indicating a lesser kind of culpability." Id. at 429.

"Willful," the mental element in Tennessee Code Annotated section 55-8-104, is essentially the same mental element as "intentional" which must be proven to establish the commission of the offense of Class E felony evading arrest. Therefore, this specific element does not establish a lesser kind of culpability. The other different elements, to wit: (1) that the defendant failed or refused to comply with *any* lawful order or direction, and (2) that the law enforcement officer had the explicit authority to direct, control, or regulate traffic, do not establish a less serious harm or risk of harm to the same public interest.

In reaching these conclusions, we are mindful of the caveat expressed in Rush: "Importantly, however, the analysis under part (b) is more narrow than the corresponding analysis espoused by the Model Penal Code because the statutory elements in question remain the focus of the inquiry." Id. at 429. The fact that a similar, but different, offense has a less serious punishment does not mean that the "different" elements of the less serious offense establish a less serious harm or risk of harm to the *same* public interest. The harm or risk of harm to the public in a Class E felony evading arrest offense is the harm to society caused by a person who uses a vehicle on public thoroughfares to avoid apprehension by law enforcement officers. The offense involves avoiding an arrest. The harm to the public resulting from a violation of section 55-8-104 relates to the safety of other drivers and pedestrians during a situation where traffic is being controlled and directed by an appropriate law enforcement officer. For the above reasons, part (b) is not satisfied.

Finally, since the evidence does not involve proof of attempt, facilitation or solicitation, it is clear that part (c) of Burns does not apply. Defendant is not entitled to relief on this issue.

IV. Sentencing

Defendant argues that the trial court erred when it relied on his prior criminal convictions to establish his sentence range and enhance his sentence length. Defendant contends that in order for prior convictions to be considered in determining range or length of sentence, the State must submit certified copies of the judgments relating to such convictions. Because the trial court relied upon computer records obtained from the Tennessee Department of Correction, rather than certified copies of judgments, Defendant contends that his four-year sentence for felony Class E felony evading arrest is excessive. We disagree.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. §§ 40-35-401(d), -402(d). If the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Therefore, meaningful appellate review requires that the trial court place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor applied, and articulate how the mitigating and enhancement factors were evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990); State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). The burden is on the appealing party, the defendant in this case, to show that the sentencing is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

Defendant was sentenced as a multiple Range II offender to four years for Class E felony evading arrest conviction and to thirty days for the misdemeanor violation of registration law. The record indicates that the trial court applied the following two enhancement factors in determining Defendant's felony sentence: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; and (8) "[t]he defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community." Tenn. Code Ann. § 40-35-114(1), (8) (1997). Defendant's presentence report revealed four prior felony convictions and eight prior Class A misdemeanor convictions. Two of Defendant's felony convictions occurred in Florida in 1985; the remaining two felony convictions occurred in Gibson County, Tennessee, in 1995. Defendant's eight misdemeanor

convictions occurred in Tennessee, between 1992 and 1999. The trial court found no mitigating factors applicable in Defendant's case.

Defendant contends that because the trial court determined his sentence based on proof of prior convictions improperly admitted for consideration, his sentence is excessive. Indeed, the record reveals that the trial court found Defendant to be a "multiple offender," based on the fact that he had received a "minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower classes, where applicable." Tenn. Code Ann. § 40-35-106(a)(1) (1997). The trial court used the remainder of Defendant's felony and misdemeanor convictions to apply enhancement factor (1). Thereafter, the trial court applied enhancement factors (1) and (8), without any mitigating factors, to enhance Defendant's sentence from two years (the minimum in Range II) to the maximum sentence of four years.

We find no error in the trial court's use of Defendant's criminal record when determining the sentence in this case. This Court has previously held that a presentence report is reliable hearsay and, further, that certified copies are not necessary to prove prior criminal history for purposes of sentencing. State v. George Matthews, No. 01C01-9805-CR-00234, 1999 WL 325954 at *2, Sumner County (Tenn. Crim. App., Nashville, May 21, 1999) (citing State v. Baker, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997)); State v. Richard J. Crossman, No. 01C01-9311-CR-00394, 1994 WL 548712 (Tenn. Crim. App., Nashville, October 6, 1994) perm. to app. denied (Jan. 1995) (courts may rely upon the presentence report in finding a prior criminal history).

We further note that the trial court heard testimony from Diane Jaynes, the presentence report writer, during the sentencing hearing. Jaynes testified that she prepared Defendant's presentence report with information received from the Tennessee Offender Management Information System ("TOMIS") and from Ms. Richardson, the probation and parole officer in Gibson County. When Jaynes also conceded that she did not see certified copies of the judgments, Defendant objected to the court's consideration of Jayne's report at the sentencing hearing, arguing that the information in her report was unsubstantiated hearsay. The trial court found that Jayne's duties required her to conduct accurate investigations and that her reliance on TOMIS and Ms. Richardson, an employee for the Tennessee Department of Correction, to accumulate information for this task was not inappropriate. Immediately following this decision, the trial court gave Defendant the opportunity to deny and/or refute the prior convictions erroneously attributed to him, if any. Receiving no response from Defendant, the trial court overruled his objection.

Our review of the statutes controlling the contents and preparation of presentence reports reveals nothing which would indicate that the presentence report writer must visually inspect certified copies of judgments prior to their inclusion in such a report. See Tenn. Code Ann. §§ 40-35-203 to -207 (1997). Neither do the statutes indicate that certified copies of judgments must be presented to the trial court prior to its consideration of a defendant's prior convictions during sentencing. Thus, we conclude that Defendant was properly sentenced as a multiple Range II offender and that his eight misdemeanor convictions and two felony convictions are sufficient to properly apply enhancement factor (1).

Defendant does not challenge the application of enhancement factor (8), and we conclude that it was also properly applied. The presentence report reflects that Defendant was on probation for two counts of assault and one count of theft from convictions occurring in June 1999. During this period of probation, in July 1999, Defendant was arrested for vandalism and possession of drug paraphernalia, and, while he was on probation for his 1985 burglary conviction in Florida, Defendant was arrested for possession of cocaine in 1992. The above arrests all resulted in convictions. Indeed, Defendant's record clearly evinces a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.

In sum, our review of the record and applicable law reveals that the trial court properly applied two enhancement factors and placed Defendant in the appropriate sentence range, in light of his extensive criminal record. Under these circumstances, a four-year sentence for Class E felony evading arrest would not have been excessive.

CONCLUSION

For the reasons set forth herein, the judgment of conviction for Class E felony evading arrest is reversed and modified to a conviction for the Class A misdemeanor offense of evading arrest. The sentence imposed for that offense is eleven (11) months and twenty-nine (29) days in the county jail at seventy-five (75%) percent minimum service prior to release, concurrent with the conviction for violation of motor vehicle registration law, and consecutive to the Gibson County convictions set forth in the judgment entered by the trial court. This case is remanded to the trial court for entry of a judgment in accordance with the opinion of this court.

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THOMAS T. WOODALL, JUDGE